IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 118

CAPITOL GREYHOUND LINES, PENNSYLVANIA GREYHOUND LINES INC., and RED STAR MOTOR COACHES, INC.,

Appellants,

vs.

ARTHUR H. BRICE,
Commissioner of Motor Vehicles,
State of Maryland,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF OF APPELLANTS

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OPINIONS DELIVERED IN COURTS BELOW

The opinion delivered by the Court of Appeals of Maryland is reported in 64 Atlantic (2d) at page 284 as *Elgin v. Capitol Greyhound Lines, Elgin v. Pennsylvania Greyhound Lines, Inc., Elgin v. Red Star Motor Coaches, Inc.* At the date hereof the opinion of the Court of Appeals of Maryland (hereinafter referred to as "the state court") is unreported in the Maryland Reports, the last volume of

such reports containing no reference to opinions or orders dated subsequent to June 11, 1947.

The opinion delivered by the Superior Court of Baltimore City (Sherbow, J.) is likewise unreported. A copy thereof has been made a part of the printed record in this case, however, and appears in the Transcript of Record beginning on page 1.

JURISDICTION

This appeal is entered pursuant to the provisions of Title 28, Section 1257 (2) of the United States Code, which provides for an appeal from a decree of the highest court of a State in which a decision may be had, where the validity of a statute of a state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

On January 22, 1948, Appellants filed in the Superior Court of Baltimore City petitions seeking the issuance of writs of mandamus to compel the Commissioner of Motor Vehicles of Maryland to issue certificates of title for their respective motor vehicles without the payment of the tax of 2% of the fair market value of each of the vehicles as provided by Section 25A, Article 66½ of the Annotated Code of Maryland. That Court issued the writs as prayed, whereupon the Commission of Motor Vehicles entered an appeal to the Court of Appeals of Maryland on June 30, 1948.

The specific question decided by the state court in its opinion (Record, page 28), in which it reversed the orders of the lower court and dismissed the petitions, was that Section 25A, Article 66½, as applied to vehicles used in interstate commerce, is not repugnant to the Commerce Clause of the Federal Constitution as being an unreasonable

and unlawful burden upon interstate commerce. In reversing the lower court, the Court of Appeals of Maryland upheld the validity of the aforementioned statute. That Court is the highest court in the State of Maryland in which a decision can be had.

It is respectfully submitted, therefore, that the jurisdiction of the Supreme Court of the United States attached in this cause under Title 28, Section 1257 (2) of the United States Code.

STATEMENT OF THE CASE

Capitol Greyhound Lines (hereinafter sometimes called "Capitol") since November 30, 1930 has, pursuant to authority vested in it by the Interstate Commerce Commission, operated daily a passenger bus line between Cincinnati, Ohio and Washington, D. C., a distance of approximately 496 miles, 9 miles of which are over state, state aid and improved county roads of Maryland. Capitol operates over the said route as part of an integrated bus system serving several states. (Record p. 18).

Pennsylvania Greyhound Lines, Inc. (hereinafter sometimes called "Greyhound") and its wholly owned subsidiary (Pennsylvania Greyhound Lines of Virginia, Incorporated) since April 25, 1930 have, pursuant to authority vested in them by the Interstate Commerce Commission, operated daily a passenger bus line between Philadelphia, Pennsylvania and Norfolk, Virginia, a distance of approximately 245.3 miles. Greyhound operates a portion of the route between Philadelphia, Pennsylvania and the Maryland-Virginia State line, a distance of approximately 172.6 miles, 41 miles of which are over state, state aid and improved county roads of Maryland. Greyhound operates over the said route as part of a nation-wide bus system.

Each of these two corporations is duly qualified to do business in the State of Maryland (Record, pp. 9, 10, 25).

Red Star Motor Coaches, Inc. (hereinafter sometimes called "Red Star") since 1938, has, pursuant to authority vested in it by the Interstate Commerce Commission, operated daily a passenger bus line between Rehoboth, Delaware and Baltimore, Maryland, a distance of approximately 120 miles, 64 miles of which are over state, state aid and improved county roads of Maryland (Record, pp. 13, 14, 25). The particular operation is but part of an integrated bus system serving substantial parts of the States of Maryland, Delaware and Pennsylvania.

All three of the Appellants are corporations engaged in the business of the public transporation of passengers for hire by motor vehicle (Record, p. 25).

Capitol, over its above described route, transported, for the period from October 1, 1946 to September 30, 1947, a total of 406,572 passengers thereby producing total gross revenues of $704,450.00. A total of 1,509 of said passengers traveling in *interstate* commerce, originated from or were destined for points within the State of Maryland thereby producing $3,695.80 of the aforesaid total gross revenues. Over its said route, Capitol also transported, pursuant to authority vested in it by the Public Service Commission of Maryland, passengers traveling in *intrastate* commerce, originating from and destined for points solely within the State of Maryland and for the aforesaid period it transported 11 of such passengers thereby producing gross revenues of $3.25 or an infinitesimal fraction of 1% of the aforesaid total gross revenues derived from the particular operation (Record, p. 18). The remaining number of passengers neither were originated in nor were destined for points in Maryland.

Greyhound and its said wholly owned subsidiary, over its previously described route, transported for the period from October 1, 1946 to September 30, 1947, an estimated total of 168,684 passengers thereby producing total gross revenues of $436,326.92. All of these passengers travelled *exclusively in interstate commerce* from (a) points in the State of Maryland to points located out of the State of Maryland and (b) points out of the State of Maryland to points in the State of Maryland and (c) points out of the State of Maryland to other points out of the State of Maryland via roads or highways in the State of Maryland. Greyhound possesses no authority from the Public Service Commission or any other regulatory agency authorizing it to transport passengers in *intrastate* commerce within the State of Maryland, and during the aforesaid period Greyhound transported no passengers in intrastate commerce within the State of Maryland (Record, p. 10).

Red Star, over its above designated route, transported for the period from June 1, 1947 to November 1, 1947, a total of 13,910 passengers, thereby producing total gross revenues of $21,087.18. A total of 5,035 of such passengers travelled in *interstate* commerce, originating from or destined for points within the State of Maryland, thereby producing $11,324.41 of the aforesaid total gross revenues. Over its said route, Red Star also transported, pursuant to authority vested in it by the Public Service Commission of Maryland, passengers traveling in *intrastate* commerce, originating from and destined for points solely within the State of Maryland, and, for the aforesaid period, it transported 6,577 of such intrastate passengers thereby producing gross revenues of $9,015.89 or approximately 42% of the aforesaid total gross revenues derived from the particular operation (Record, p. 14). The remaining number of total passengers neither were originated in nor destined to points in Maryland.

Capitol, Greyhound and Red Star each purchased a public passenger motor vehicle during the year 1947 necessary for use over its respective aforementioned route and obtained from the Public Service Commission of Maryland a permit authorizing it to operate its motor vehicle in interstate commerce over the roads and highways in the State of Maryland embraced in its repective route. The vehicle purchased by Red Star was purchased on July 18, 1947 at a cost of $18,637.50, the vehicle purchased by Capitol was purchased on July 18, 1947 at a cost of $25,258.70 and that of Greyhound was purchased on October 22, 1947 at a cost of $29,002.60 (Record, pp. 10, 14, 18).

On January 8, 1948, Capitol and Greyhound applied to the Department of Motor Vehicles for the issuance of a certificate of title for the public passenger motor vehicles purchased by each of them and presented the required certificate of mileage proposed to be operated in Maryland as issued by the Public Service Commission of Maryland. On January 12, 1948, Red Star made a similar application with respect to the vehicle purchased by it and presented a similar certificate of mileage as issued by the Public Service Commission to it. Each of these applications was made on forms provided by the Department of Motor Vehicles and tender was made to the Department of the sum of $1.00 with each application for the issuance of a certificate of title for each vehicle. By Sec. 218 of Art. 81 of the Annotated Code of Maryland, as amended by Chapter 326 of the Acts of 1947, the issuance of a certificate of title for a motor vehicle is a prerequisite to the issuance of a registration certificate and distinguishing plates and markers. By Sec. 20 of Art. 66½ of the Annotated Code of Maryland (1943 Supp.) a registration certificate and distinguishing plates and markers are required before any motor vehicle may be operated over state, state-aid, improved county roads,

and streets and roads of incorporated towns and cities in the State of Maryland (Record, p. 26).

With respect to each of the three applications for the issuance of a certificate of title, the action of the Department of Motor Vehicles, acting under the instructions of its administrative head, the Commissioner of Motor Vehicles, was the same in that the application was refused and the sum tendered in payment was returned to the particular applicant. In each instance, the Commissioner of Motor Vehicles alleged that the amount tendered was insufficient and that the applicant was required to pay an excise tax of 2% on the fair market value of the vehicle for which a certificate of title was sought as a condition precedent to the issuance of the certificate of title and, therefore, to the issuance of a certificate of registration and distinguishing plate and markers. The said excise tax is imposed by Section 25A of Art. 66½ of the Annotated Code of Maryland (1947 Supp.). Such tax would amount to $372.75 in the case of Red Star, $505.17 in the case of Capitol and $580.00 in the case of Greyhound (Record, pp. 10, 15, 19, 27).

The inequalities of the application of the tax are best demonstrated by a comparison of each company's operation in Maryland with the entire route travelled and the amount of tax sought to be charged against each of the Appellees as shown by the following table:

	Entire Route Travelled	Operation in Maryland	Amount of Tax
Red Star	120 Miles	64 Miles	$372.75
Capitol	496 Miles	9 Miles	505.17
Greyhound	172 Miles	41 Miles	580.00

It is not disputed that, with the exception of the payment of the titling tax, each of the Appellees has complied with all of the prerequisites necessary to be met for the issuance of the certificates of title sought (Record, p. 27).

On January 22, 1948, each of the Appellants filed in the Superior Court of Baltimore City a petition for a Writ of Mandamus, to compel the Commissioners of Motor Vehicles (i) to accept the Appellants' applications for the issuance of a certificate of title for their respective motor vehicles and retain the sum of One Dollar ($1.00) for the transfer of the title in each case, as tendered by each of your Appellants in connection with their respective applications, and (ii) to issue to the Appellants' certificates of title for their respective public passenger motor vehicles in accordance with the provisions of the Annotated Code of Maryland, without the payment of a tax of 2% of the fair market value of said vehicle as provided by Sec. 25A of Art. 66½ of the Annotated Code of Maryland. Writs of Mandamus in each case were prayed on the ground, *inter alia*, that the said Sec. 25A of Art. 66½ is unconstitutional, as imposing an unreasonable and unlawful burden upon interstate commerce in violation of the Commerce Clause of the Federal Constitution (Record, pp. 11, 12, 16, 20).

Demurrers to each of the petitions were filed by the Commissioner of Motor Vehicles, the demurrers were overruled and answers were thereafter filed admitting all allegations of fact in the said petitions. After argument by counsel for all parties but without further hearing on June 14, 1948, the Superior Court of Baltimore City entered an order providing for the issuance of Writs of Mandamus as prayed in each of the three cases on the ground, *inter alia*, that Sec. 25A of Art. 66½ of the Annotated Code of Maryland imposes an unreasonable and unlawful burden on interstate

commerce in contravention of the Federal Constitution (Record, pp. 13, 17, 21).

On June 30, 1948, the Commissioner of Motor Vehicles of the State of Maryland, entered an appeal to the Court of Appeals of Maryland from the aforementioned orders of the Superior Court of Baltimore City, directing that Writs of Mandamus be issued.

On February 10, 1949, after the submission of briefs and oral argument in the cause, the state court in an opinion filed that date, reversed the orders of the Superior Court of Baltimore City, with costs, and dismissed the petitions of the Appellants (Record, p. 24). The mandate of the state court was thereafter issued on March 12, 1949.

On May 5, 1949, upon petition by the Appellants, an appeal to this Court was allowed by Honorable Ogle Marbury, Chief Judge of the Court of Appeals of Maryland and on October 17, 1949, this Court entered an order noting probable jurisdiction on this case (Record, pp. 38, 42).

SPECIFICATION OF THE ASSIGNED ERRORS TO BE URGED

The Appellants assign as errors:

1. That the Court of Appeals of Maryland erred in holding that Section 25A of Article 66½ of the Annotated Code of Maryland, imposing a tax of 2% upon the fair market value of motor vehicles used in interstate commerce as a condition precedent to the issuance of certificates of title thereto (the issuance of such certificates being a further condition precedent to the registration and operation of such vehicles in the State of Maryland) was not in contravention of Article I, Section 8, Clause 3, of the Federal Constitution.

2. That the Court of Appeals of Maryland erred in holding that the State of Maryland is not prohibited by Article I, Section 8, Clause 3, of the Federal Constitution from imposing a tax upon Appellants based upon the fair market value of vehicles used in interstate commerce, as a condition precedent to permitting Appellants to engage in interstate commerce over the public highways of Maryland.

3. That the Court of Appeals of Maryland erred in holding that the State of Maryland is not prohibited by Article I, Section 8, Clause 3, of the Federal Constitution from imposing upon Appellants, as public carriers of passengers for hire by motor vehicle in interstate commerce over the public highways of Maryland, a tax of 2% of the fair market value of each motor vehicle as a condition precedent to such use without regard to the relationship between the use of roads made by such vehicles and the amount of the tax.

ARGUMENT

The three assigned errors raise the basic question of whether or not the provisions of Article 66½, Section 25A of the Annotated Code of Maryland (1947 Supplement) insofar as the same require the payment of the excise tax by interstate carriers as therein provided, constitute an unreasonable and unlawful burden on interstate commerce in contravention of Article I, Section 8 of the Constitution of the United States.

The controversial Section above-mentioned is herewith set out in full:

> "25A. (Excise Tax for the Issuance of Certificates of Title.) (a) In addition to the charges prescribed by this Article there is hereby levied and imposed an excise tax for the issuance of every original certificate of title for motor vehicles in this State and for the issu-

ance of every subsequent certificate of title for motor vehicles in this State in the case of sales or resales thereof, and on and after July 1, 1947, the Department of Motor Vehicles shall collect said tax upon the issuance of every such certificate of title of a motor vehicle at the rate of two per centum of the fair market value of every motor vehicle for which such certificate of title is applied for and issued.

"(b) The Department of Motor Vehicles shall require every applicant to supply information as it may deem necessary as to the time of purchase, the purchase price and other information relative to the determination of the fair market value.

"(c) The Department of Motor Vehicles shall remit all sums collected under the provisions of this section to the State Treasurer, who shall use and apply the same, first, to the extent required for debt service on State Highway Construction Bonds pursuant to Sections 147G to 147P, both inclusive, of Article 89B of the Annotated Code of Maryland (1939 Edition), as enacted by Section 18 of Chapter 560, Acts of 1947, and shall transfer the balance thereof, if any, to the construction fund for the State Roads Commission provided by Section 11(e) of said Article 89B.

"(d) Certificates of title for all motor vehicles owned by the State of Maryland or any political subdivision of the State and for fire engines and other fire department emergency apparatus, including ambulance operated by or in connection with any fire department, shall be exempt from the tax imposed by this Section."

In its opinion the state court, we submit, erred as a matter of law in concluding that "Where a tax on interstate motor carriers is allocated to state highway funds, it is an imposition on the privilege of using the state roads and is not a violation of the commerce clause if reasonable in amount and non-discriminatory (Record, p. 29). This, we contend, is not the conclusion to be reached by a proper

interpretation of the opinions cited by the Court in support of its opinion and of its decree, as will be hereafter shown. To the contrary, we respectfully assert that these opinions hold that a tax of the character here involved is valid only if the same bears some reasonable relationship to the use of the highways by the carrier concerned.

Assuming, however, the state court's conclusion to be a correct statement of the law, then, it is submitted, that court erred in applying the law and in finding the tax imposed by Article 66½, Section 25A of the Annotated Code of Maryland (1947 Supplement) to be reasonable in amount. The court, for the purpose of determining that the tax is reasonable took the largest single tax imposed upon the three Appellants, *gratuitously assumed the usable life of Appellants' motor buses to be five years, divided the amount of tax by five, and found that the resulting annual tax was reasonable in amount* (Record, p. 32). Without laboring the point at this preliminary stage of the argument, it must be pointed out that the finding by the state court that the normal life of the Appellants' vehicles is five years was not supported by any allegations disclosed on the face of the pleadings or by any evidence of any nature whatsoever in the record and yet it was upon a mere *assumption* of such a period of usable life that the Court of Appeals based its final conclusion that the amount of the annual tax was reasonable. As we shall hereafter point out, the life expectancy of a particular vehicle constitutes no valid measure for determining the reasonableness of a tax of the character herein challenged and yet it was that sole measure which the state court adopted.

I.

The Tax Imposed by Article 66½, Section 25A, is a Burden upon Interstate Commerce because it is Unrelated to Road Use and is Non-Compensatory in amount.

It is the first contention of the Appellants that such tax as is here imposed *must bear a direct relationship to the use made or to be made of the roads and that such a tax is valid only if compensatory in amount.* This is a wholly different proposition from that advanced by the Appellee below and adopted by the state court in reaching its conclusion that the tax is constitutional simply if it happens to be reasonable in amount and the proceeds therefrom are dedicated to the construction or maintenance of highways. The cases relied upon to support the conclusion reached by the lower court do not have that effect we submit but, to the contrary, support the contentions of the Appellants.

At the outset, it is considered vital to a determination of the constitutional issue to consider the legislative history of Article 66, Section 25A of the Annotated Code of Maryland. The tax therein levied and here in question was first adopted in 1935 by Chapter 539 of the Acts of the General Assembly of Maryland of that year and the rate then imposed was 1% of the fair market value. The proceeds of the tax were required to be paid into a special account in the State Treasury known as the "State Emergency Relief Fund." Chapter 3 of the Acts of 1936 amended the prior Act to provide that the proceeds of the tax should be paid into the "State Fund for Aid to the Needy." Chapter 560 of the Acts of 1947 amended the law in two vital respects as regards this litigation. For the first time the tax was to be applied not only upon the issuance of an original certificate of title, but upon subsequent transfers as well. And

also for the first time the proceeds were to be used generally for highway purposes by providing first for the servicing of State Highway construction bonds and the balance to be paid into the construction fund of the State Roads Commission (Record, pp. 2-3).

In addition to the tax here sought to be levied, an annual seat-mile tax is levied upon registration of each vehicle by Article 81, Section 218 of the Annotated Code of Maryland (1947 Supp.).

It may thus be seen that this tax, originally levied as a relief measure during the depression years, is now sought to be levied upon interstate carriers without change in its original design except as regards allocation of the proceeds. The validity thereof is sought to be sustained for the sole reason that the proceeds from the collection of the tax are now used for general road purposes without regard to road use and on the bland assumption that, since it is but 2% of the fair value of the vehicle, it must necessarily be reasonable in amount. An examination of the cases decided by this Court cannot support the validity of this tax, we most earnestly submit.

The extent to which a state may impose various kinds of taxes on motor vehicles operating in interstate commerce has been considered many times by this Court. One of the earliest of such cases, *Hendrick v. Maryland*, 235 U. S. 610, 59 L. Ed. 389 (1915), involved the constitutional validity of provisions of the Maryland law which required certain non-residents to register their vehicles in this state and pay a registration fee graduated according to the horsepower of their vehicles before they would be permitted to use the Maryland roads. It was held that it was within the constitutional power of the states to enact such regulations

and that the protection of the commerce clause was not infringed. The Court made these general statements:

> "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles — those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines — a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress. * * *
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> "In view of the many decisions of this court there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; *and so long as they are reasonable and are fixed according to some uniform, fair and practical standard* they constitute no burden on interstate commerce. * * * The action of the State must be treated as correct unless the contrary is made to appear. * * *" (Emphasis supplied.)

A similar New Jersey regulation which required the licensing of non-resident motorists and registration of their vehicles and exacted a fee therefor was sustained in *Kane v. New Jersey*, 242 U. S. 160, 61 L. Ed. 223 (1916).

In *Clark v. Poor*, 274 U. S. 554, 71 L. Ed. 1199 (1927), a statute of Ohio was attacked as being in violation of the commerce clause of the constitution which required motor transportation companies engaged in interstate commerce to obtain a certificate from the Ohio Public Utilities Commission for authority to operate within the state and to pay an annual license fee *based on the number and capacity of the vehicles used*. The provision with respect to obtaining approval from the Utilities Commission was sustained, and with respect to payment of the annual license tax, the Court said:

> "* * *. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to insure safety and convenience and the conservation of the highways. Morris v. Duby, No. 372, decided April 18, 1927 (274 U. S. 135, ante, 966, 47 Sup. Ct. Rep. 548). Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30; Hess v. Pawloski, No. 263, decided May 16, 1927 (274 U. S. 352, ante, 1091, 47 Sup. Ct. Rep. 632). Compare Packard v. Banton, 264 U. S. 140, 144, 68 L. ed. 596, 607, 44 Sup. Ct. Rep. 257.
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> "There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is *so large* as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act; and some for other purposes. *This, if true, is immaterial.* Since the tax is

> *assessed for a proper purpose and is not objectionable in amount,* the use to which the proceeds are put is not a matter which concerns the plaintiffs."

In *Interstate Busses Corporation v. Blodgett,* 276 U. S. 245, 72 L. Ed. 551 (1928), the tax assailed was imposed by the State of Connecticut solely on interstate carriers by motor vehicle and *was based upon the number of miles travelled within the State of Connecticut by such carriers.* It was shown that such carriers paid a property tax on their vehicles, a gasoline tax on gasoline purchased in Connecticut and an annual registration fee for the required annual registration in addition to the tax attempted to be imposed and that all the taxes were used for highway purposes. Nevertheless, the Court sustained the validity of the mileage tax repeating the established rule:

> "* * * the state may impose a reasonable charge for the use of its highways by motor vehicles so employed (in interstate commerce) * * *."

A complete review of these earlier cases and an appraisal of their holdings was made in *Sprout v. South Bend,* 277 U. S. 163, 72 L. Ed. 833 (1928). In that case, the city of South Bend, Indiana, passed an ordinance prohibiting the operation on its streets of any motor bus unless licensed by the city. Sprout, a resident of Indiana, operated a bus with seats for twelve persons in interstate commerce through the city. He refused to obtain a city license which would have cost $50.00 per year and in consequence was prosecuted and convicted for failure to have a license. The conviction was sustained in the state courts.

The contention was made that the city licensing ordinance violated the commerce clause of the Federal Constitution and the Court sustained this contention. In so doing it enumerated three instances where a state or a city, if

properly authorized, may impose a tax or form of tax on vehicles operating in interstate commerce. Such instances are:

(1) where the tax is a reasonable license fee imposed as part of a scheme of regulation under the state's police power and the licensing is appropriate to the end sought to be achieved;

(2) where the tax is an excise for use of the highways and bears a direct relation in amount to the value of use of the highways; or

(3) where the tax is an occupation tax or a tax on the right to do business and is imposed solely on intrastate business of a person doing business in interstate and intrastate commerce and where it appears that such tax is no greater because of the interstate business done, that the tax has no application to a person engaged exclusively in interstate business and that a person engaged in intrastate and interstate commerce could discontinue the intrastate business without discontinuing the interstate business.

The language of the Court, by Mr. Justice Brandeis, is important enough to require quoting *in extenso*. As to the first of the three above mentioned instances in which a state may properly impose a tax on vehicles operating in interstate commerce, the Court said:

> "It is true that, in the absence of Federal legislation covering the subject, the state may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded. Hendrick v. Maryland, 235 U. S. 610, 622, 59

L. ed. 385, 390, 35 Sup. Ct. Rep. 140; Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 Sup. Ct. Rep. 30; Morris v. Duby, 274 U. S. 135, 71 L. ed. 966, 47 Sup. Ct. Rep. 548; Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 Sup. Ct. Rep. 702. Compare Hess v. Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 Sup. Ct. Rep. 632. These powers may also be exercised by a city if authorized to do so by appropriate legislation. * * * Such regulations rest for their validity upon the same basis as do state inspection laws, * * * and municipal ordinances imposing on telegraph companies, though engaged in interstate commerce, a tax to defray the expense incident to the inspection of poles and wires. * * * But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee cannot be sustained as a police measure."

Next the Court discussed the constitutionality of an excise tax related to the use of the highways and said:

"It is true also that a state may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways. Hendrick v. Maryland, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, ante, 551, 48 Sup. Ct. Rep. 230. And this power also may be delegated in part to a municipality by appropriate legislation. * * * An exaction for that purpose may be included in a license fee. Hendrick v. Maryland, supra; Kane v. New Jersey, 242 U. S. 160, 168, 169, 61 L. ed. 222, 227, 228, 37 Sup. Ct. Rep. 30; Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 Sup. Ct. Rep. 702. But no part of the license fee here in question may be assumed to

have been prescribed for that purpose. *A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways.* And there is no suggestion, either in the language of the ordinance or in the construction put upon it by the supreme court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets." (Emphasis supplied.)

And finally the Court discussed the constitutionality of a tax on the privilege of doing business:

"It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. * * * And it may delegate a part of that power to a municipality. * * * But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

In *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953 (1931), a privilege tax was imposed by the State of Tennessee on concerns operating interstate motor busses graduated according to the carrying capacity of the vehicle and amounting to about $500 for a vehicle seating between

twenty and thirty passengers. The carrier, in this case, operated within the state exclusively in interstate commerce. This tax was levied in addition to fees for licensing and registering motor vehicles, gasoline taxes and property taxes. The proceeds of the tax were allocated to the general funds of the state while the proceeds of all other motor vehicle taxes were used for highway purposes. This tax was strikingly similar to a privilege tax levied by Tennessee on concerns operating intrastate motor buses, which latter tax was part of a comprehensive scheme to tax the carrying on of all types of businesses within the state. The tax was held invalid as amounting to a tax on the privilege of doing interstate business and not a tax as compensation for use of the highways. It was thus distinguishable from *Interstate Busses Corp. v. Blodgett* and *Clark v. Poor*, supra. In its opinion, the Court reiterated the general rules with respect to taxation by the states of vehicles operated in interstate commerce. The Court said:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce (Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 62 A. L. R. 45, 48 S. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon (Kane v. New Jersey, 242 U. S. 160, 168, 169, 61 L. ed. 222, 227, 228, 37 S. Ct. 30; Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702; Sprout v. South Bend, supra (277 U. S. 169, 170, 72 L. ed. 836, 837, 62 A. L. R. 45, 48 S. Ct. 502). As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. *This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned*

to the use (Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 72 L. ed. 551, 48 S. Ct. 230), *or by the express allocation of the proceeds of the tax to highway purposes*, as in Clark v. Poor, 274 U. S. 554,* 71 L. ed. 1199, 47 S. Ct. 702, supra, or otherwise. *Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.* Hendrick v. Maryland, 235 U. S. 610, 612, 59 L. ed. 385, 35 S. Ct. 140; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252, 72 L. ed. 551, 554, 555, 48 S. Ct. 230. Compare Interstate Busses Corp. v. Holyoke Street R. Co., 273 U. S. 45, 51, 71 L. ed. 530, 534, 47 S. Ct. 298. But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity." (Emphasis supplied.)

The Court then concluded from an examination of the general scheme for obtaining state revenue in Tennessee and the failure to dedicate the proceeds thereof, that the tax was one on the privilege of doing interstate business.

Following *Interstate Transit, Inc. v. Lindsey, supra*, a case arose which attempted to re-open the question settled by the *Hendrick, Kane* and *Poor* cases, namely, the constitutional authority of a state to require an operator of interstate vehicles to register his vehicles and pay an annual registration fee. *Aero Mayflower Transit Company v. Ga. Public Service Comm.*, 295 U. S. 285, 79 L. Ed. 1439 (1935). The State of Georgia required private car-

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* "The Ohio statute there involved declared that the taxes were laid, and were to be used only for, the maintenance and repair of highways and for the regulation of motor traffic. Ohio Gen. Code, §§614-94, 614-96. The 'other purposes,' referred to in the opinion, 274 U. S. at p. 557, 71 L. ed. 1200, 47 S. Ct. 702, were the general expenses of the state motor vehicle department as distinguished from expenditures specifically upon the highways."

riers for hire to register their vehicles, obtain a certificate from the Public Service Commission and pay an annual registration fee of $25.00 for each vehicle. It was held that these provisions could be applied to such a carrier operating in interstate commerce. This Court, affirming the Supreme Court of Georgia, pointed out not only that the question had long been settled but that the registration fee was moderate in amount, was used for highway maintenance and applied without discrimination to interstate and intrastate carriers. The earlier opinions in *Sprout v. South Bend* and *Interstate Transit Co. v. Lindsey, supra,* were cited as authorities for the finding.

In the case of *Dixie Ohio Express Co. v. State Revenue Commission,* 306 U. S. 72, 83 L. Ed. 495 (1939), an interstate carrier for hire was required to pay a fee graduated on a vehicle's certified chassis weight and ranging from $50.00 to $75.00. This fee was an annual one, the proceeds were used for highways and the fee was in addition to an annual registration fee of $3.00 and an annual Public Utilities Commission fee of $25.00. The validity of the fee or tax was upheld as reasonable compensation for use of the highways. The court, however, in considering the validity of the imposition, again repeated the general rules with respect to the imposition of fees or taxes upon vehicles operating in interstate commerce. The language of the Supreme Court in this case is as follows:

> "It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce. * * * But, consistently with the commerce clause, a State may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax as compensation for the privilege of using its highways for that purpose. The applicable principle is stated in Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 S. Ct. 140. We there said (pp. 623, 624): 'In view

> of the many decisions of this court there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and *so long as they are reasonable and are fixed according to some uniform, fair, and practical standard,* they constitute no burden on interstate commerce.' That rule has been applied in many cases. * * * While ordinarily state action is deemed valid unless the contrary appears, we have held that to sustain a charge by the State for the use or privilege of using its roads for interstate transportation, it must affirmatively appear that the charge is exacted as compensation or to pay the cost of policing its highways." (Emphasis supplied.)

The Court then applied these rules and considered the reasonableness of the tax. It was pointed out that the tax applied equally to intrastate and interstate vehicles, and that on the basis of data supplied by the taxpayer, the tax amounted to about 8 mills per mile. This patently modest charge, the Court said, in the absence of any other proof, indicated that the tax was fixed in accordance with a reasonable standard and did not exceed the value to the carrier of the use of the roads.

Applying the tests set forth by this Court to the statutory provisions here in issue it may readily be observed that the so-called "titling tax" imposed by Article 66½, Section 25A, meets none of them. This tax is not a license fee imposed as part of a scheme of regulation under the police power nor does it bear any relation to the value of the use of the highways in amount. On the contrary, it was this type of tax, in effect, which Justice Brandeis condemned in *Sprout v. South Bend, supra.* It can hardly be said that the

market value of a motor vehicle bears any relationship to the extent of the use thereof upon highways over which it travels. To tax an interstate motor carrier on a percentage of that market value each time title to a vehicle is transferred to the carrier is to levy a flat tax. To repeat the language of this Court in *Sprout v. South Bend, supra:*

> *"A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."*

The state court, in its opinion, cites several cases to support its thesis that where the proceeds of a tax on interstate motor carriers are allocated to state highway funds, it constitutes an imposition on the privilege of using the state roads and is not a violation of the commerce clause if reasonable in amount and non-discriminatory. *Interstate Transit, Inc. v. Lindsey,* 283 U. S. 183, 186, 75 L. Ed. 953 (1931); *Morf v. Bingaman,* 298 U. S. 407, 412, 80 L. Ed. 1245 (1936); *Ingles v. Morf,* 300 U. S. 290, 294, 81 L. Ed. 653 (1937); *Aero Mayflower Transit Co. v. Board of R. R. Commissioners,* 332 U. S. 495, 505, 92 L. Ed. 99 (1947).

We have heretofore dealt with the case of *Interstate Transit, Inc. v. Lindsey, supra,* and have shown, we submit, that the case cannot support the conclusion below. It was there said:

> "* * * But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. *Being valid only if compensatory, the charge must be necessarily predi-*

cated upon the use made, or to be made, of the highways of the state. Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702, supra. *In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity.* The tax is proportioned solely to the earning capacity of the vehicle. *Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."* (Emphasis supplied.)

Morf v. Bingaman, 298 U. S. 407, 80 L. Ed. 1245 (1936), involved the constitutionality of the New Mexico Caravan Act. The Court discussed at length the peculiar nature of the operation involved and its impact upon the cost of the state of maintaining the highways and policing them. The Court specifically found that the charge of $7.50 for vehicles operated under their own power, and $5.00 for vehicles being towed, was not unreasonable in view of the increased financial burden placed upon the state by such operations. The Court said, *inter alia:*

"* * * It is not shown to exceed a reasonable charge for the privilege and for defraying the cost of police regulation of the traffic involved, such as a state may impose, if non-discriminatory, on automobiles moving over its highways interstate. (Citations omitted.)

"The facts, as stipulated, established that the transportation of automobiles across the state in caravans, for the purpose of sale, is a distinct class of business, of considerable magnitude. Large numbers of such cars move over the highways in caravans or processions. Seventy-five to eighty per cent of the cars in appel-

lant's caravans are in units of two, coupled together by tow bars. Each unit is in charge of a single driver, who operates the forward car and thus controls the movement of both cars by the use of the mechanism and brakes of one. Appellant's drivers, except two or three regularly employed, are casually engaged. They usually serve without pay and bear their own expenses in order to secure transportation to the point of destination, although a few receive very small remuneration and expenses. The legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than drivers of state licensed cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increase the inconvenience and hazard to passing traffic. Car trouble to any one car sometimes results in stalling the entire caravan. The state has found it expedient to make special provisions for the inspection and policing of caravans moving in this traffic.

"There is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways, with enhanced wear and tear on the roads and augmented hazards to other traffic, which imposes on the state a heavier financial burden for highway maintenance and policing than do other types of motor car traffic. We cannot say that these circumstances do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways."

Again, it is apparent from a consideration of the entire opinion of this Court, that the test applied in that case and to be applied in other similar cases (i.e. where the tax is imposed as a part of a scheme of regulation under the state's police power) is whether or not the amount of the charge is a "reasonable charge for the privilege and for defraying the cost of police regulation of the traffic involved." As will appear from the above quotation, the court specifically considered the particular nature of the operation and the increased wear and tear on the roads caused by such operation, as shown by the evidence, and the heavier financial burden for highway maintenance caused by it. The court justified the nominal tax on the ground that the evidence showed an increased financial burden on the state, and measuring the amount of the tax against this burden found that it had not been shown that the amount of the tax exceeded a reasonable charge. In other words, this Court again found that the amount of the tax bore a direct relationship to the use made or to be made of the roads, and that the evidence established a reasonable basis, measured by such use made or to be made of the roads, for the imposition of the nominal tax involved. There is no such showing in this case. It is submitted that this case is not authority for the position of the Court of Appeals.

The recent opinion of this Court in *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana*, 332 U. S. 495, 92 L. Ed. 99 (1947), was cited by the state court as authority to sustain the constitutionality of the titling tax when assessed against a carrier engaged in interstate commerce. A careful consideration of the opinion in that case, however, compels a contrary conclusion. In its discussion of the facts in that case, the Court said:

> "Two distinct Montana levies are questioned. Both are imposed by that state's Motor Carriers Act, Mont.

Rev. Codes (1935) §§3847.1-3847.28. One is a flat tax of $10 for each vehicle operated by a motor carrier over the state's highways, payable on issuance of a certificate or permit, which must be secured before operations begin, and annually thereafter. §3847.16(a). The other is a quarterly fee of one-half of one per cent of the motor carrier's 'gross operating revenue,' but with a minimum annual fee of $15 per vehicle for class C carriers, in which group appellant falls. §3847.27. Each tax is declared expressly to be laid 'in consideration of the use of highways of this state' and to be 'in addition to all other licenses, fees and taxes imposed upon motor vehicles in this state.' * * *

"Appellant is a Kentucky corporation with its principal offices in Indianapolis, Indiana. Its business is exclusively interstate. It consists in transporting household goods and office furniture from points in one state to destinations in another. * * *

"In 1935 appellant received a class C permit to operate over Montant highways, as required by state law. Until 1937, apparently, it complied with Montana requirements, including the payment of registration and license plate fees for its vehicles operating in Montana and of the 5¢ per gallon tax on gasoline purchased there. However, in 1937 and thereafter appellant refused to pay the flat $10 fee imposed by §3847.16(a) and the $15 minimum 'gross revenue' tax laid by §3847.27. In consequence, after hearing on order to show cause, the appellee board in 1939 revoked the 1935 permit and brought this suit in a state court to enjoin appellant from further operations in Montana.

"Upon appellant's cross-complaint, the trial court issued an order restraining the board from enforcing the 'gross revenue' tax laid by §3847.27. But at the same time it enjoined appellant from operating in Montana until it paid the fees imposed by §3847.16(a). On appeal the state supreme court held both taxes applicable to interstate as well as intrastate motor carriers and construed the term 'gross operating revenue' in §3847.27 to mean 'gross revenue derived from opera-

tions in Montana. It then sustained both taxes as against appellant's constitutional objections, state and federal. Accordingly, it reversed the trial court's judgment insofar as the 'gross revenue' tax had been held invalid, but affirmed the decision relating to the flat $10 tax. Mont. , 172 P. 2d 452.

"We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function, according to appellant's view of their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the state courts. Accordingly, we accept the state court's rulings, insofar as they are material, that the two sections apply alike to interstate and intrastate commerce and that 'gross operating revenue' as employed in §3847.27 comprehends only such revenue derived from appellant's operations within Montana, not outside that state.

"Moreover, since Montana has not demanded or sought to enforce payment by appellant of more than the flat $15 minimum fee for class C carriers under §3847.27, we limit our consideration of the so-called 'gross revenue' tax to that fee. This too is in accordance with the state supreme court's declaration. * * *

"With the issues thus narrowed, we have, in effect, two flat taxes, one for $10, the other for $15, payable annually upon each vehicle operated on Montana highways in the course of appellant's business, with each tax expressly declared to be in addition to all others and to be imposed 'in consideration of the use of the highways of this state'."

In discussing the controlling law applicable to the above facts the court specifically found, *inter alia*, as follows:

"Interstate traffic equally with intrastate may be reasonably required to pay a fair share of the cost and maintenance *reasonably related to the use made of the highways.*" (Emphasis supplied.)

(2) "Appellant, therefore confuses a tax *assessed for a proper purpose and not objectionable in amount.* Clark v. Poor, supra, (274 U. S. at 557, 71 L. ed. 1201, 47 S. Ct. 702), that is, a tax affirmatively laid for the privilege of using the state's highways with a tax not imposed on that privilege" * * *. (Emphasis ours.)

(3) "The present taxes on their face are exacted 'in consideration of the use of the highways of this state,' that is they are laid for the privilege of using those highways. *And the aggregate amount of the two taxes taken together* is less than the amount of similar taxes this Court has heretofore sustained *Cf. Dixie Ohio Co. v. Comm'n., supra; Aero Transit Co. v. Georgia Comm'n., supra.*" (Emphasis ours.)

From the facts and conclusions of law as above quoted it is manifest that the Court in the *Aero Mayflower Transit Co.* case held that the imposition on an interstate carrier of annual flat taxes aggregating but twenty-five ($25) dollars exacted "in consideration of the use of the highways" constituted no undue burden upon interstate commerce. It so held because, as the Court was careful to point out, neither the *character* nor the *amount* of the tax imposed exceeded the constitutional powers of the state to tax interstate carriers. The tax was imposed to raise revenues for highway maintenance and the amount of such tax was within that previously approved by the Court, *Dixie Ohio Co. v. Comm'n.* and *Aero Transit Co. v. Georgia Comm'n., supra.*

In the instant case, however, the amount of the flat tax on the interstate carrier involved far exceeds any such tax heretofore approved by this Court and is not computed or measured by any reasonable relationship to the use of the highways of Maryland. For instance, one of the Appellants traverses the highways of Maryland 64 miles daily,

another 41 miles daily and the third 9 miles daily but *each* would be required to pay a tax of 2% on the fair market value of every bus purchased for use over its particular route. It is difficult to conceive of a tax *less related to or measured by highway use* than one which imposes the same tax (assuming the fair market value of the vehicle to be the same in both instances) upon a carrier operating over three hundred miles daily as upon a carrier operating daily over but a fraction of such mileage.

The tax is not only utterly unrelated to highway use but is imposed with striking irregularity. It attaches when a vehicle is originally purchased or subsequently *transferred* to a new owner. If the vehicle is purchased and operated over the roads for many years, the tax is collected but once irrespective of how little or how much such vehicle is operated over the highways. Thus, in the case of five vehicles owned and operated by a particular carrier, the tax may be payable once in five years or five times in one year by reason of the replacement of worn out or obsolete equipment. The burden of the tax would hence be the greatest on the most efficient carrier which constantly replaces equipment.

It is equally difficult to conceive of any valid argument to support a contention that the fair market value of a public passenger vehicle constitutes a proper yardstick for measuring its use of the highways. Obviously a used bus of great weight and with maximum seating capacity may have a lesser fair market value at the time of registration than a new light weight bus with very limited seating capacity. Nevertheless, despite the fact that the heavier vehicle would cause more wear and tear upon the highways which it traversed, the latter would pay a greater tax. Let it be emphasized once more that, in such circumstances, the smaller vehicle would be re-

quired to pay a greater tax even though it operated over a lesser number of Maryland highway miles than the heavier used vehicle.

A careful analysis of the authorities fails to disclose any tax of the nature and amount challenged in this case which has been held valid when imposed upon an interstate carrier. The conventional taxes imposed upon interstate carriers and which have stood the test of judicial approval are those measured either by ton or passenger seat miles traversed within the particular state or where the amount thereof was so small as to be deemed *per se* reasonable as constituting a fair contribution toward (a) the cost of administering state regulations or laws enacted under its police power or (b) the cost of maintaining state highways. The tax sought to be imposed upon the carriers herein fails to fall within either category.

From all of the cases herein discussed certain rules are established by which the constitutionality of the Maryland titling tax, as applied to vehicles operated in interstate commerce, may be determined. It is admittedly well settled that the State of Maryland may impose certain taxes upon vehicles operated in interstate commerce. It may impose reasonable license fees as a part of a scheme of regulation undertaken in the exercise and administration of its police power and it may impose reasonable charges related to the use of its roads. It may not impose a tax for the mere privilege of engaging in interstate commerce.

The titling tax is obviously *not* a license fee. By its precise terms it purports to be an excise tax and its legislative history discloses that it is purely a revenue-raising measure. Legitimate license fees are imposed by the state by Section 218 of Article 81 and a charge for the issuance of a certificate of title is imposed by Section 24(e) of Article 66½.

Thus the titling tax, if it can be sustained, must be a tax to compensate the state in a reasonable sum related to the use of its roads. It is submitted that the titling tax is not such a tax.

The prior decisions of this Court unquestionably establish that taxes for highway use, except where purely nominal, must be commensurate in amount with the extent of that use. To tax otherwise is to impose an invalid burden on interstate commerce, for, in principle and effect, an excessive charge for highway use by reason of the failure to correlate highway use to the amount of tax results in exacting from interstate commerce more than its fair share of the local services employed and local protection afforded. That interstate commerce should not pay more than its own way and that a state cannot consistently impose burdens on interstate commerce by exacting more than the fair share of the cost of local facilities and local protection of such commerce has been recently repeated in *Freeman v. Hewitt*, 329 U. S. 249, 91 L. Ed. 265 (1946), and *Central Greyhound Lines v. Mealy*, 334 U. S. 653, 92 L. Ed. 1633 (1948). In the last analysis, taxes upon gross receipts not earned within the state or taxes for alleged highway charges greater in amount than the fair value of the use of highway facilities are equally offensive to the Constitution because they constitute an exaction from interstate commerce by a State of a greater amount than the value of local services, use of local facilities and local protection afforded. Both types of taxes are equally forbidden.

While the proceeds of the challenged tax are now expressly allocated to the construction and maintenance of public highways, the amount of the tax, the measure of its determination and the general characteristics thereof amply

demonstrate that the tax bears no reasonable relation to the use of the highways. It is a hybrid creature designed originally for one purpose and sought now to be validated for another, in spite of its infirmities in regard to its application to interstate carriers.

II.

ERROR OF FACT IN THE DECISION OF THE COURT OF APPEALS OF MARYLAND

We have heretofore pointed out that the state court concluded that the tax was valid because it found the same to be reasonable in amount and the proceeds therefrom devoted to highway construction and maintenance funds. We have also pointed out that the purported reasonableness of the tax was sustained by the lower court by assuming an arbitrary life expectancy of five years for the Appellants' vehicles and dividing the payment of the tax on each vehicle by said number of years, all without any evidence in the record to support the aforegoing assumption. There is nothing in the allegations in the petitions herein or the answers thereto (the latter admitting all the allegations in the petitions) from which the state court could have found *as a fact* the aforementioned life expectancy for the Appellants' vehicles. Indeed, the first suggestion of such a life expectancy was the reference thereto in the opinion of the state court.

This Court has many times stated that it will re-examine the facts of a case when the existence of a Federal right depends upon such appraisal. In the recent case of *Hooven and Allison Company v. Evatt*, 324 U. S. 652, 89 L. Ed. 1252, this Court, speaking through Justice Stone, said,

> "In all cases coming to us from a State court, we pay great deference to its determinations of fact. But when the existence of an asserted Federal right or immunity depends upon the appraisal of undisputed

facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the Federal right or immunity, as applied, we are free to re-examine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. Kansas City Southern R. Co. v. Albers Commission Co., 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 S. Ct. 316; Truax v. Corrigan, 257 U. S. 312, 325, 66 L. ed. 254, 260, 42 S. Ct. 124, 27 A. L. R. 375; First Nat. Bank v. Hartford, 273 U. S. 548, 552, 71 L. ed. 767, 770, 47 S. Ct. 462, 59 A. L. R. 1, and cases cited; Fiske v. Kansas, 274 U. S. 380, 385, 386, 71 L. ed. 1108, 1110, 1111, 47 S. Ct. 655; Norris v. Alabama, 294 U. S. 587, 589, 590, 79 L. ed. 1074, 1076, 1077, 55 S. Ct. 579."

In *Norris v. Alabama*, supra, the Court, speaking through Mr. Chief Justice Hughes held:

"That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured. Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 S. Ct. 882; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 593, 59 L. ed. 735, 740, 35 S. Ct. 429, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, Ann. Cas. 1916A, 1; Ward v. Love County, 253 U. S. 17, 22, 64 L. ed. 751, 758, 40 S. Ct. 419; Davis v. Wechsler, 263 U. S. 22, 24, 68 L. ed. 143, 145, 44 S. Ct. 13; Fiske v. Kansas, 274 U. S. 380, 385, 386,

71 L. ed. 1108, 1110, 1111, 47 S. Ct. 655; Ancient Egyptian Arabic Order v. Michaux, 279 U. S. 737, 745, 73 L. ed. 931, 936, 49 S. Ct. 485."

The state court here, however, has sustained the reasonableness of the amount of the challenged tax by the patently arbitrary process of adopting assumptions as facts and without evidence in the record to even give credence to the assumptions.

We respectfully submit that even if the state court's untenable proposition that the challenged tax is valid if (i) the amount thereof is reasonable and (ii) the proceeds therefrom are devoted to highway purposes, the *reasonableness* must be determined on the basis of facts admitted by the pleadings or other evidence in the record.

Since none of the allegations in the petitions seeking the issuance of the writs of mandamus contained a single reference to the age or life expectancy of any of the vehicles of the Appellants used in their aforementioned respective operations and since all allegations in the petitions were admitted by the Appellee we submit that such age or life expectancy were not matters properly before the court, and, hence could not properly be considered by the state court in passing upon the Constitutional issue.

CONCLUSION

It is respectfully submitted that the decree appealed from should be reversed.

Respectfully submitted,

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